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IN THE

# Supreme Court of the United States

**October Term, 1958**

**No. 119**

SAMUEL ROTH,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA.

## PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Cases Cited


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## PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your Petitioner, SAMUEL ROTH, hereby petitions for a rehearing of the denial by this Court on October 13, 1958 of a Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit, which affirmed the denial of a motion for reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure, when the sentence imposed was the maximum sentence for violation of the federal obscenity law, holding (*inter alia*) that unconstitutional standards may be used in sentencing and in denying relief from such sentence so long as some data which may legitimately be

considered is before the sentencing court, even though the United States had falsely represented to the court (on the motion) that a six-man majority of this Court had found the material involved to be pornographic, when the original sentence (and its reaffirmance upon the motion) was explicity based upon Petitioner's past record of concededly unconstitutional convictions.

The grounds of this petition are as follows:

1. There is an intervening circumstance which we believe may be of substantial or controlling effect: the fact that Petitioner was denied parole on or about October 31, 1958, after this Court had denied certiorari. This Court may well have felt that the situation described in the Petition should be dealt with through the parole power, as indeed the United States Attorney had argued in the Court below. Obviously, the parole power is being used to keep petitioner in jail, and not to remedy the situation.

2. This Court may have felt that a sentence within allowable statutory limits may not be revised by a federal appellate court, in accordance with the decisions of the Courts of Appeal for the Eighth and the Second Circuits, respectively. [*Gurera* v. *United States*, 40 F. 2d 338, 340; *United States* v. *Pagano*, 224 F. 2d 682.]. However, the decision of the Court below, to the effect that there may be no review for abuse of discretion, conflicts with following decisions of the Court of Appeals for the Fourth, Sixth, and Tenth Circuits respectively, holding federal sentences reviewable for abuse of discretion: *Tinsler* v. *United States*, 11 F. 2d 18, 21, cert. den. 271 U. S. 664 ("gross or palpable abuse"); *Livers* v. *United States*, 185 F. 2d 807, 809 ("plain showing of gross abuse"); *Dryden* v. *United States*, 139 F. 2d 487, 488 (when sentence is "clearly and manifestly cruel and unusual"); *Richards* v. *United States*, 193 F. 2d 554, 557 (when sentence is clearly "excessive,

cruel and unusual").[1] See, also, in accord, Frank, *J.*, concurring, in *Rosenberg* v. *United States*, 195 F. 2d 583, 604 *et seq.* (C. A. 2, 1952). (State Courts, in cases where the statutes governing judicial review are the same as the federal, do consider and reduce sentence. See 89 A. L. R. 295, 299. The decision below thus conflicts with decisions of state court of last resort.)

It may well be that this Court was not familiar with this conflict in the decisions of the lower Federal Courts in regard to review for abuse of discretion, and we therefore call it to this Court's attention upon this Petition. The question of whether the Court of Appeals erroneously failed to review for abuse of discretion was presented in our petition (Question 6, p. 4).

3. We pointed out in our Petition (p. 14) that the Assistant United States Attorney had falsely informed the Court on the Rule 35 motion that a six-man majority of this Court had found the material involved to be pornographic (p. 9). We did not, however, refer to the decision of this Court in *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115. There, this Court reopened

[1] In our Petition, we claimed that there had been "a gross abuse of discretion" (*e.g.*, Petition, p. 24). We showed that the sentence was clearly and manifestly cruel, since petitioner's age and physical condition made his sentence equivalent to one of death (Petition, p. 17, n. 10). Its excessiveness—a maximum sentence for a concededly minimal offense—was also protested. (Petition, p. 16).

In denying the Petition, this Court may have felt that a reversal of the decision below would have opened up a Pandora's Box. However, it should be noted that a decision of this Court, reviewing a sentence for gross abuse of discretion when a cruel, unusual, and excessive sentence is imposed because of a past record of concededly unconstitutional convictions, would result in a sparseness of a litigation, not a plethora thereof—especially when the refusal to disturb the sentence followed immediately upon a false material representation by the United States and when the United States concedes that all such material factors were then considered. (Brief, p. 6).

administrative hearings after final judgment, merely in order to test the credibility of certain Government witnesses on the basis of facts developing after hearing. In a 6-3 opinion (per Frankfurter, *J.*), this Court ruled as follows:

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. (Citation omitted.) Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Id.* at 124.

Unless, therefore, our claim of disregard for the honor of the administration of justice is irrational or perverse, this Court cannot disregard our claim, and must grant review. We respectfully submit that the cruel and unusual sentence—and the refusal to modify it—of a person to the equivalent of a death sentence in a case he sought as a constitutional test, for a writing he disseminated, on the basis of a record of concededly unconstitutional convictions, where false information as to the views of this Court was furnished to the court by the United States, creates a claim which can hardly be called irrational or perverse. It is the doing of *in*justice which has been mad manifest. Unless this Court grant review here, the stirring language of Mr. Justice Frankfurter will be barren of meaning.

## CONCLUSION

**This Petition for Rehearing of the denial of the Petition for Writ of Certiorari should be granted, and a Writ of Certiorari should issue to the United States Court of Appeals for the Second Circuit.**

Respectfully submitted,

HERBERT MONTE LEVY,
*Attorney for Petitioner,*
11 East 44th Street,
New York 17, New York.

### Certificate of Counsel

HERBERT MONTE LEVY, counsel for Petitioner, hereby certifies as to the following:

1. This petition for rehearing is presented in good faith and not for delay.

2. This Petition is restricted to the grounds specified in Rule 58 (2) of the Rules of this Court, *i.e.*, grounds which are confined to intervening circumstances of substantial or controlling effect, and other substantial grounds available to petitioner although not previously presented.

HERBERT MONTE LEVY,
*Counsel for the Petitioner.*